

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD HEYER

No. C-10-4525 MMC

Plaintiff,

v.

GOVERNING BOARD OF THE MOUNT
DIABLO UNIFIED SCHOOL DISTRICT; et
al.,

Defendants.

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S
FIRST AMENDED COMPLAINT;
GRANTING IN PART AND DENYING IN
PART DEFENDANTS' MOTION TO
STRIKE; VACATING HEARING; ORDER
TO SHOW CAUSE**

Before the Court are defendants the Governing Board of the Mount Diablo School District ("District"), Alan Young ("Young"), and John McMorris's ("Morris") (collectively, "defendants") motion to dismiss plaintiff's First Amended Complaint ("FAC") and alternative motion to strike portions thereof, both filed January 14, 2011. Plaintiff Richard Heyer ("Heyer") has filed opposition, to which defendants have replied. Having read and considered the papers filed in support of and in opposition to the motions, the Court deems the matter suitable for decision on the parties' respective submissions, VACATES the hearing on said motions scheduled for February 25, 2011, and rules as follows.

1. Defendants move to dismiss Heyer's state law claims against defendants on the ground such claims are barred by the Eleventh Amendment. See Pennhurst Stat Sch. & Hosp. v. Halderman, 465 U.S. 89, 101, 104-06 (1984) (holding Eleventh Amendment

1 bars claims asserting “state official has violated state law” (emphasis in original)). Heyer
 2 states he “has no opposition to [d]efendants[‘] claim that they are immune from suit for
 3 state law violations in federal court.” (See Opp. at 16:16-17.) Accordingly, the Court will
 4 dismiss the FAC’s Third, Sixth, Seventh, Eighth, and Ninth causes of action, asserting
 5 claims under California’s Constitution and Fair Employment and Housing Act.

6 2. Defendants move to dismiss, as against Young and McMorris, Heyer’s
 7 harassment claim, brought under Title VII, 42 U.S.C. § 2000e-2, on the ground said
 8 defendants cannot be held liable as supervisors. Heyer states he “has no opposition to
 9 claims that individual defendants, Alan Young and John McMorris may not be liable for
 10 harassment pursuant to” Title VII. (See Opp. 17:3-6.) Accordingly, the Court will dismiss
 11 the FAC’s Fifth Cause of Action, asserting harassment under Title VII, as against Young
 12 and McMorris.

13 3. Defendants move to dismiss Heyer’s remaining causes of action for failure to
 14 state a claim for which relief can be granted. Heyer opposes defendants’ motion to
 15 dismiss, asserting the FAC alleges sufficient facts to state a claim for (1) age discrimination
 16 in violation of the ADEA, 29 U.S.C. § 623; (2) race and color discrimination in violation of
 17 Title VII, 42 U.S.C. § 2000e-2(a); (3) retaliation in violation of Title VII, 42 U.S.C. § 2000e-3;
 18 and (4) harassment in violation of both Title VII, 42 U.S.C. § 2000e-2(a) and the ADEA,
 19 which claims are alleged in the FAC’s First, Second, Fourth, and Fifth Causes of Action,
 20 respectively.

21 “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a ‘short and
 22 plain statement of the claim showing the pleader is entitled to relief.’” Ashcroft v. Iqbal, 129
 23 S. Ct. 1937, 1949 (2009) (quoting Rule 8(a)(2)). “[T]he pleading standard Rule 8
 24 announces does not require detailed factual allegations, but it demands more than an
 25 unadorned, the-defendant-unlawfully-harmed-me accusation.” Id. (internal quotation and
 26 citation omitted). “A pleading that offers labels and conclusions or a formulaic recitation of
 27 the elements of a cause of action will not do.” Id. (internal quotation and citation omitted).
 28 “Nor does a complaint suffice if it tenders naked assertions devoid of further factual

1 enhancement." Id. (internal quotation, alteration, and citation omitted).

2 Here, Heyer alleges the following facts: Heyer is a sixty-year-old Caucasian male
 3 (see FAC ¶ 1), with "a Bachelor of Arts Degree from California State University at
 4 Sacramento, California and a Master of Arts Degree in Secondary Education from the
 5 University of San Francisco" (see FAC ¶ 7); Heyer has been "continuously employed as a
 6 certified educator or administrator in the East Bay Public Schools since 1987, and has
 7 always performed all of his assigned and related duties in an excellent manner" (see FAC
 8 ¶ 8); and Heyer was employed for approximately twelve years as a "Vice-Principal at
 9 Northgate High School, Walnut Creek, California in the Mount Diablo Unified School
 10 District, until on or about June 30, 2010," when he was removed from that position and
 11 reassigned to a classroom teacher position (see FAC ¶ 9).

12 Notably missing from Heyer's factual allegations, however, are any facts to support
 13 his claims for discrimination and harassment. Rather, Heyer asserts, in conclusory fashion,
 14 that his demotion was "unlawful[]" (see FAC ¶ 9); that he has been subjected to "egregious,
 15 unlawful, discriminatory employment practices," including "[u]nwarranted, unrelenting over
 16 and close scrutiny," "[c]ontinuous harassment," "[c]ontinuous undermining of ability to
 17 perform duties," "[u]nwarranted criticism," "[f]alse negative performance evaluation," and
 18 "[f]alse accusation of unprofessional conduct" (see FAC ¶ 11); that the alleged actions
 19 "have been taken against [Heyer] on account of his age" (see FAC ¶ 15); that Heyer "was
 20 denied transfer or reassignment as Vice-Principal because of his race and color" (see FAC
 21 ¶ 23); and that Heyer has been subjected to harassment "on account of his race, and color
 22 and age" (see FAC ¶ 46). The FAC contains insufficient facts "to raise a right of relief
 23 above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).¹
 24 Accordingly, the Court will dismiss the FAC's First, Second, and Fifth Causes of Action for
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26 ¹ In opposition to the motion to dismiss, Heyer submits a declaration in which he
 27 makes various additional factual allegations. Heyer's declaration is not properly before the
 28 Court, however, as, "[i]n determining the propriety of a Rule 12(b)(6) dismissal, a court may
not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in
 opposition to a defendant's motion to dismiss." See Schneider v. Cal. Dep't of Corrections,
 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (emphasis in original).

1 failure to state a claim upon which relief can be granted.

2 In contrast, and contrary to defendants' argument, Heyer alleges sufficient facts to
 3 plead a retaliation claim. In particular, Heyer alleges he engaged in protected activity, his
 4 filing with the United States Equal Employment Opportunity Commission ("EEOC") an
 5 "administrative charge of discrimination" on June 4, 2010 (see FAC ¶ 43),² that within the
 6 month he suffered an adverse employment action, his demotion, on June 30, 2010
 7 (see FAC ¶ 9), and that he was demoted because, inter alia, he filed the above-referenced
 8 charges (see FAC ¶ 39);³ see also *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065
 9 (9th Cir. 2002) (noting "causation can be inferred from timing alone where an adverse
 10 employment action follows on the heels of protected activity").

11 Defendants next move to strike the FAC's prayer for relief to the extent Heyer seeks
 12 punitive damages and to strike allegations supporting a "common law tort of intentional
 13 infliction of emotional distress." (See Mot. to Dismiss at 5.) Heyer concedes punitive
 14 damages are not recoverable against a public entity but argues, correctly, that damages for
 15 emotional distress are recoverable on his above-referenced federal claims, including his
 16 Fourth Cause of Action. See 42 U.S.C. § 1981a(b)(3).

17 Accordingly, the Court will deny defendants' motion to dismiss the Fourth Cause of
 18 Action, grant defendants' motion to strike to the extent Heyer seeks punitive damages, and
 19 deny defendants' motion to strike to the extent Heyer seeks damages for emotional

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 21 ² Heyer also alleges, albeit in conclusory fashion, that he "opposed practices made
 22 an unlawful employment practice, and made a charge, under [the Civil Rights Act]."
 23 (See FAC ¶ 38.)

24 ³ Defendants request the Court take judicial notice of documents filed in the
 25 California Superior Court for Contra Costa County in an action titled Heyer v. Governing
Board of the Mount Diablo Unified School District, No. 10-859. Heyer does not oppose the
 26 request. Nonetheless, while the Court may take notice of the fact that Heyer filed his
 27 "Petition for Writ of Mandate" in said action on June 2, 2010, see MGIC Indem. Corp. v.
Weisman, 803 F.2d 500, 504 (9th Cir. 1986), the Court may not accept as true, for
 28 purposes of the instant motion to dismiss, Heyer's allegation in said petition that the District
 decided to demote him on April 13, 2010 (see Def.'s Req. for J. Notice, Ex. 1 ¶ 7), nor take
 notice of a letter from the District, dated April 14, 2010, notifying Heyer of his demotion,
 which letter is attached to the District's opposition to said petition (see id. Ex. 3 at Ex. 3
 attached thereto); Guam Inv. Co. v. Cent. Bldg., Inc., 288 F.2d 19, 23 (9th Cir. 1961)
 (holding district court may not judicially notice "facts adjudicated in another case").

1 distress.

2 Heyer has not, however, alleged sufficient facts to show he has exhausted his
 3 administrative remedies as to his retaliation claim. “To establish subject matter jurisdiction
 4 over [a] Title VII retaliation claim, [a plaintiff] must have exhausted his administrative
 5 remedies by filing a timely charge with the EEOC.” See Vasquez v. Cnty. of L.A., 349 F.3d
 6 634, 644 (9th Cir. 2003). “Subject matter jurisdiction extends to all claims of discrimination
 7 that fall within the EEOC’s actual investigation or an EEOC investigation that could
 8 reasonably be expected to grow out of the charge.” Id. Here, Heyer did not present his
 9 retaliation claim to the EEOC (see FAC Ex. 1), nor could he have done so, as, according to
 10 the FAC, that claim arose after he filed his charge with the EEOC, see Vasquez, 349 F.3d
 11 at 645 (“The EEOC could not have investigated [alleged retaliation] because it had not yet
 12 happened by the time the EEOC was conducting its investigation.”) Further, although
 13 Heyer identified Young and McMorris as responsible parties in his EEOC charge (see FAC
 14 Ex. 1 at ¶ 4), the FAC does not identify the parties responsible for his demotion and asserts
 15 the claim against the District alone (see FAC ¶ 9); see also Vasquez, 349 F.3d at 644
 16 (noting, in deciding whether “current retaliation claim is reasonably related to the EEOC
 17 charge” courts consider “such factors as the alleged basis of the discrimination, dates of
 18 discriminatory acts specified in the charge, perpetrators of discrimination named in the
 19 charge, and any locations at which the discrimination is alleged to have occurred”).

20 Accordingly, as this ground was not raised in defendants’ motion, the Court will order
 21 Heyer to show cause why his claim for retaliation should not be dismissed for lack of
 22 subject matter jurisdiction.

23 For the reasons stated above,

24 1. Defendants’ motion to dismiss is hereby GRANTED in part and DENIED in
 25 part as follows:

26 a. As to the First, Second, Third, Fifth, Sixth, Seventh, Eighth and Ninth
 27 Causes of Action, defendants’ motion to dismiss is hereby GRANTED;

28 b. As to the Fourth Cause of Action, defendants’ motion to dismiss is

1 hereby DENIED; and

2 c. Plaintiff is hereby ORDERED TO SHOW CAUSE in writing, filed no
3 later than March 4, 2011, why the Fourth Cause of Action should not be dismissed for lack
4 of subject matter jurisdiction.

5 2. Defendants' motion to strike is hereby GRANTED to the extent the FAC
6 seeks punitive damages and is otherwise DENIED.

7 3. Plaintiff's Second Amended Complaint, if any, shall be filed no later than
8 March 4, 2011.

9 **IT IS SO ORDERED.**

10 Dated: February 22, 2011


MAXINE M. CHESNEY
United States District Judge

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